[Cite as *State v. Keefe*, 2013-Ohio-629.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio — Court of Appeals No. E-12-014

Appellee — Trial Court No. 2011-CR-220

v.

John J. Keefe — **DECISION AND JUDGMENT**

Appellant — Decided: February 22, 2013

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Brian J. Darling, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals a judgment of conviction for two counts of unlawful sexual conduct with a minor, entered on a guilty plea in the Erie County Court of Common Pleas. Because we conclude that the offenses are not allied offenses of similar

import and the court did not err in considering a foreign presentence investigation report, we affirm.

{¶ 2} Appellant is John J. Keefe. Appellant was indicted for two counts of rape and one count of unlawful sexual conduct with a minor. The indictment charged that on October 14, 2010, appellant, then age 25, engaged in unlawful sexual conduct with two 15-year-old girls.

{¶ 3} Appellant initially entered a not guilty plea to all counts, but following negotiations with the state, agreed to plead guilty to two counts of unlawful sexual conduct with a minor; one count as a third degree felony and the other as a fourth degree felony.

{¶ 4} On November 15, 2011, following a plea colloquy pursuant to Crim.R. 11, the trial court accepted appellant's plea and found him guilty. At sentencing, the court ordered appellant to serve a 60-month term of incarceration on the third degree felony and a consecutive 18 months on the fourth degree felony. Both terms were ordered to be served concurrently with an unrelated Huron County sentence. From this judgment, appellant now brings this appeal.

{¶ 5} Appellant sets forth the following two assignments of error:

I. The imposition of consecutive sentences was unlawful due to the allied offense nature of the crime.

II. The trial court's use of another jurisdiction's pre-sentence report in sentencing Mr. Keefe violated Due Process.

I. Allied Offenses of Similar Import

{¶ 6} In his first assignment of error, appellant asserts that the trial court erred in imposing consecutive sentences, because the two offenses for which he was convicted should have merged as allied offenses of similar import.

{¶ 7} R.C. 2941.25 provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 8} R.C. 2941.25 prevents multiple convictions of a single defendant arising out of the same occurrence. *State v. Johnson*, 128 Ohio St.3d 153, 161, 2010-Ohio-6314, 942 N.E.2d 1061. The statute limits legal exposure on acts which naturally arise from similar criminal acts when committed in a single transaction.

{¶ 9} The test to determine if multiple charges should be classified as allied offenses is two-pronged: (1) "[W]hether it is possible to commit one offense and commit the other with the same conduct" and (2) "whether the offenses were committed by the

same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id.* at ¶ 48-49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50. "[I]f the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Johnson*, 128 Ohio St.3d at ¶ 51.

{¶ 10} If the same offense is committed against more than one victim, the animus is separate and merger is not required. *State v. Smith*, 2d Dist. No. 24402, 2012-Ohio-734, ¶ 19. "[A] thief who commits theft on three separate occasions or steals different property from three separate victims in the space, say, of 5 minutes, can be charged with and convicted of all three thefts." *Johnson* at ¶ 15, fn. 2. (Additional citations omitted.) *See also State v. Alcala*, 6th Dist. No. S-11-026, 2012-Ohio-4318, ¶ 37.

{¶ 11} Appellant purports that the conduct with both minors was committed through a single action and animus. The encounters were at the same time and place. However, this argument is unpersuasive. These were offenses against separate persons and not subject to merger. Accordingly, appellant's first assignment of error is not well-taken.

II. Use of Another Jurisdiction's Presentence Investigation Report

{¶ 12} In his second assignment of error, appellant contends that the trial court's use of another jurisdiction's presentence investigation report ("PSI"), on unrelated offenses, was improper.

{¶ 13} At sentencing in the current case, the trial court announced, on the record, its intention to consider the information in a foreign PSI. The court offered both parties the opportunity to view the report. Both parties consented to its use without review. Appellant contends that the use of the foreign PSI prejudiced his sentence and stripped him of his due process rights.

{¶ 14} "A proper objection must be raised at trial to preserve error." *State v. Brown*, 38 Ohio St.3d 305, 306, 528 N.E.2d 523 (1988). When an objection is not timely, the purpose wherein may only be evaluated for plain errors that would affect "substantial rights." Crim.R. 52(B).

{¶ 15} While, in our experience, it is unusual for a court to consider a presentence investigation report from a different jurisdiction, appellant has directed us to no authority which would prevent such a practice. Indeed there is no requirement that the court order a presentence investigation at all unless the court intends to place the offender under a community control sanction. *See* R.C. 2951.03. *State v. Henry*, 37 Ohio App.3d 3, 10, 523 N.E.2d 877 (6th Dist.1987).

{¶ 16} Appellant also failed to preserve error by objection during trial and failed to articulate the manner in which he might be prejudiced by this purported error. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 17} On consideration whereof, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R.24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE